RESPONDENT

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STATEMENT OF THE CASE

A. Procedural History In The Courts Below

This case was initiated when Respondent Michael Peoples (hereinafter "Peoples"), a prisoner serving a state court-imposed term of 15 to 30 years at the Pennsylvania State Correctional Center at Huntingdon upon his conviction for robbery, arson and aggravated assault, filed on July 28, 1986 a *pro se* Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254 (J.A. at 2, 70). In his habeas petition, filed in the United States District Court for the Eastern District of Pennsylvania, Mr. Peoples made the following claims in support of his prayer for relief:

1. that he was improperly impeached with two prior robbery convictions and a theft conviction, in violation of his Fourteenth Amendment due process rights (J.A. at 73);[1]

2. that he was improperly deprived of a right to a non-jury trial, in violation of his due process rights and his rights under the equal protection clause of the Fourteenth Amendment (J.A. at 74);

3. that suggestive pre-trial identification procedures were used, in violation of his Fourteenth Amendment due process rights (*Id.*); and

4. that he was denied effective assistance of counsel, as guaranteed by the Sixth Amendment, based upon his trial counsel's failure to move to suppress the fruits of an illegal arrest and counsel's failure to object to the admission of evidence of unrelated criminal conduct (specifi-

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[1] Mr. Peoples also alleged a violation of a state statute (now codified at 42 Pa. C.S. § 5918) regulating the use of convictions in cross-examination (J.A. at 73).

cally, an alleged contempt of court based on the allegation that Mr. Peoples changed his hair style shortly before a scheduled line-up) (*Id.*).

The matter was referred to United States Magistrate Edwin E. Naythons who directed that a response be filed and that the state trial court record be delivered to the clerk of the court (J.A. at 3; App. at 173a). The Philadelphia District Attorney filed a response on September 30, 1986, contending that Mr. Peoples had not exhausted his state remedies and, in the alternative, addressing the merits of Mr. Peoples' claims (J.A. at 3).

On October 20, 1986, Mr. Peoples filed a *pro se* reply to the Commonwealth's response, entitled "Petitioner's Traverse to Respondents [sic] Answer," contending that he had exhausted his state remedies and, in the alternative, that state remedies were inadequate to protect his rights because of the history of undue delay in state court adjudication of his claims (J.A. at 3; App. at 63a). He pointed out that both the Superior Court and the Supreme Court of Pennsylvania had been given an opportunity to address his claims, and that he had filed both a "counseled" (*see* J.A. at 64) and a *pro se* Petition for Allowance of Appeal in the Supreme Court of Pennsylvania (*see* J.A. at 49).[2] When the *pro se* Petition is considered, he argued, it is clear that he exhausted his state remedies.

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[2] A Petition for Allowance of Appeal, akin to Petition for Writ of Certiorari in this Court, constitutes a request that the Supreme Court of Pennsylvania exercise its discretionary authority and consider the merits of the appeal. *See* 42 Pa.C.S. § 724(a) (establishing discretionary jurisdiction); Pa. R. App. Pro. 1111 *et seq.* (setting out requirements for petition).

On April 3, 1987, Magistrate Naythons filed a Report and Recommendation in which he concluded that Mr. Peoples failed to exhaust his state remedies, and recommended that the petition be denied without prejudice (J.A. at 3, 77). The Report and Recommendation did not discuss or address Mr. Peoples' *pro se* Petition for Allowance of Appeal, but discussed only the "counseled" petition (J.A. at 78).

On April 17, 1987, five days before the date by which Mr. Peoples was statutorily required to file his objections to the Magistrate's Report and Recommendation,[3] the Honorable Marvin Katz of the United States District Court for the Eastern District of Pennsylvania entered an order approving and adopting Magistrate Naythons' Report and Recommendation, denying and dismissing the Petition for failure to exhaust state remedies, denying a request for state court transcripts, and finding no probable cause for appeal (J.A. at 4, 84).

On April 20, 1987, three days after the entry of the order of Judge Katz denying and dismissing the Petition,

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[3] Under the applicable provision of the Magistrate's Act, Mr. Peoples was required to file any written objections to the Report and Recommendation within ten days of service of the Report and Recommendation. 28 U.S.C. § 636(b)(1); Rule 8(b)(3) of the Rules Governing Section 2254 Cases in the United States District Courts. Under Rules 6(a) and (e) of the Federal Rules of Civil Procedure, weekends are excluded and three additional days are added since service was made on Mr. Peoples by mail. Thus, his objections were required to be filed on or before April 22, 1987.

Even if the additional three days allowed when service is by mail, under Rule 6(e), is not considered to be subject to the Rule 6(a) weekend exclusion, Mr. Peoples' *pro se* objections to the Magistrate's Report and Recommendation were still filed in a timely fashion, and Judge Katz's April 17, 1987 Order was entered before the deadline (*i.e.* April 20, 1987).

Mr. Peoples filed a timely *pro se* document entitled "Objections to Magistrate Report/Recommendation" (J.A. at 4, 86). (*See also* footnote 2, *supra*, for calculation of the date for filing objections to Report and Recommendation.) In his *pro se* objections, Mr. Peoples contended that he had exhausted his state remedies by alleging, *inter alia*, the ineffective assistance of counsel in the Superior Court and the Supreme Court of Pennsylvania, and by raising these claims at the earliest opportunity and in conformity with state procedure (J.A. at 86-87). (*See* discussion of state procedure at pages 23 through 31, *infra*.)[4] Thus, he argued, the Report and Recommendation should not be approved to the extent the Magistrate found that Mr. Peoples had failed to exhaust his remedies (*Id.*).

Two days after the objections were filed, Judge Katz entered an order similar to the earlier order of April 17 dismissing the petition for failure to exhaust, adding only that the objections to the Report and Recommendation were denied (J.A. at 4, 89).

On April 28, 1987, Mr. Peoples filed a timely notice of appeal, purporting to initiate an appeal from the order of April 17,[5] and requesting the issuance of a certificate of probable cause and the appointment of counsel (J.A. at 5; App. at 81a).

On June 3, 1987, the Honorable Collins J. Seitz of the United States Court of Appeals for the Third Circuit

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[4] Mr. Peoples also made arguments on the merits of his claims, rephrasing the claims in certain respects.

[5] That the notice of appeal referenced the "earlier" final order constitutes harmless error. *Forman* v. *Davis*, 371 U.S. 178 (1962). Thus, the court of appeals had jurisdiction. *Id.*

granted the request for a certificate of probable cause (J.A. at 8) and the undersigned was appointed to represent Mr. Peoples.

Following briefing and oral argument, the Third Circuit addressed the exhaustion issue in an unpublished per curiam opinion, reversing the dismissal of the habeas petition on exhaustion grounds and remanding for consideration of the merits of the habeas claims (J.A. at 90-97).

A timely Petition for a Writ of Certiorari was filed by the Commonwealth, and was granted by this Court.

B. Factual History

The relevant factual history consists of the procedural record in the courts of the Commonwealth of Pennsylvania as to Mr. Peoples' conviction and appeal, and a comparison of the manner in which various claims were made in the state courts with the claims of constitutional deprivations made in the *pro se* Petition for Writ of Habeas Corpus.

Mr. Peoples was convicted by a jury before the Honorable James T. McDermott of the Philadelphia Court of Common Pleas on January 16, 1981 (J.A. at 14). In his Post Verdict Motions, Mr. Peoples' trial counsel, Harvey S. Booker, Esquire, raised the following grounds in support of Mr. Peoples' request for post verdict relief:

1. Prosecutorial misconduct based on prejudicial speeches to the jury.

2. The identification of Mr. Peoples by James Wright, a prosecution witness, was impermissibly tainted.

3. The line-up scheduled at defendant's request was cancelled.

4. The trial court erred in permitting the impeachment of Mr. Peoples with two prior robbery convictions.
5. The trial court erred in denying Mr. People's request for a non-jury trial.
6. The trial court erred in permitting the cross-examination of the defendant with uncertified notes of prior testimony.
7. The trial court erred in giving an accomplice charge to the jury.

(J.A. at 11-13).

The Honorable Charles P. Mirarchi, Jr.[6] entered an opinion dated June 8, 1982, denying Mr. Peoples' Post Verdict Motions (J.A. at 14).

Mr. Peoples appealed to the Superior Court of Pennsylvania, the intermediate appellate court in Pennsylvania's judicial system. Newly appointed counsel, Vincent T. Snyder, Esquire, filed a brief on January 1, 1983 (J.A. at 26). In his brief, Mr. Snyder made the following arguments:

1. That trial court erred in failing to suppress the identification of Mr. Peoples by James Wright, a prosecution witness, based on tainted identification procedures (J.A. at 27, 29-34).
2. That trial court erred in denying Mr. Peoples' request for a line-up (J.A. at 28, 34).
3. That trial court erred in ruling that Mr. Peoples could be impeached with his prior robbery convictions. (J.A. at 28, 34-47).
4. That trial court erred in giving an accomplice instruction to the jury (J.A. at 28, 37-39).

[6]Judge McDermott had been elected to the Supreme Court of Pennsylvania in the interim and the case was assigned to Judge Mirarchi.

5. That sentences imposed were illegal due to the merger of offenses (J.A. 28, 39-41).
6. That Mr. Peoples was denied the effective assistance of trial counsel, based on the following errors (J.A. at 28, 41-43):
   a. trial counsel failed to attend the scheduled line-up and failed to request a point for charge on the unreliability of identification testimony.
   b. trial counsel failed to prepare adequately in that he failed to interview Mr. Peoples, was unable to locate a helpful witness, and failed to explain to Mr. Peoples his right to a jury and a non-jury trial.
   c. trial counsel was allegedly under the influence of alcohol during trial, refused to abide by Mr. Peoples' wishes as to the use of peremptory strikes, and did not obtain the notes of the suppression hearing prior to trial.
   d. trial counsel failed to challenge properly the sufficiency of the evidence and the legality of the sentences imposed.

The Superior Court affirmed Mr. Peoples' conviction in Memorandum Opinion, Per Curiam Order and Judgment filed on September 16, 1983 (J.A. at 44-48).

On October 14, 1983, Mr. Peoples filed a timely *pro se* request for discretionary review by the Supreme Court of Pennsylvania entitled "Petition for Allowance to File Appeal to Review Errors of Superior Court with Appointment of New Counsel" (J.A. at 49) (hereinafter "*pro se* Petition for Allowance of Appeal").[7]

[7]There were two copies of Mr. Peoples' *pro se* Petition for Allowance of Appeal filed in the district court. Both copies were supplied by Mr. Peoples from his personal files and no copy was

Mr. Peoples raised the following claims in his *pro se* Petition for Allowance of Appeal:

a. That he was denied his right to the effective assistance of counsel during his appeal to the Superior Court in that Vincent Snyder failed to raise claims of error committed by trial counsel as to the following:

(i) in failing to challenge the fact that Judge James T. McDermott, the trial judge, failed to write a timely opinion on Mr. Peoples' post verdict motions (J.A. at 49-51).

(ii) in failing to object to the prosecutor's prejudicial statements in speeches to the jury (J.A. at 51-52).

(iii) in failing to object to evidence that Mr. Peoples had changed his appearance before the scheduled line-up, in violation of a court order (J.A. at 56-57).

(iv) in failing to object to the manner in which the burden of proof was "shifted" to Mr. Peoples as to the issue of identification based upon the evidence of the change in his appearance (J.A. at 55-56).

b. That the trial court and the Superior Court erred as to the admission of Mr. Peoples' prior convictions (J.A. at 53).

c. That the trial court and the Superior Court erred by ruling that Mr. Peoples was not entitled to a non-jury trial (J.A. at 53-54).

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supplied by the state court.

The district court entered an order directing that the clerk of the state trial court provide that court's file to the district court. That file did not include the records of the Superior Court or the Supreme Court of Pennsylvania.

d. That the trial court erred in refusing Mr. Peoples' request for a lineup (J.A. at 54-55).

e. That trial counsel and appellate counsel were ineffective for failing to object to evidence that Mr. Peoples had changed his appearance by cutting his hair after arrest, leading to the cancellation of the line-up (J.A. at 55).

f. That the lower court erred in giving an accomplice charge to the jury (J.A. at 57-58).

In response to the *pro se* Petition for Allowance of Appeal, the Supreme Court of Pennsylvania granted the request for appointment of counsel. The court directed the appointment of counsel "to assist [Mr. Peoples] in filing a petition for allowance of appeal" (J.A. at 61).[8] Thus, the Supreme Court did not rule on the merits of the *pro se* Petition for Allowance of Appeal.

On or about June 1, 1985, Stephen P. Gallagher, Esquire, newly appointed to represent Mr. Peoples, filed a Petition for Allowance of Appeal (hereinafter, "counseled Petition for Allowance of Appeal"), making the following claims of ineffective assistance of trial and appellate counsel (J.A. at 62):

1. The trial court erred in permitting the cross-examination of Mr. Peoples as to his prior convictions (J.A. at 66-67).

2. The trial court erred in refusing Mr. Peoples' motion to suppress physical evidence and a statement obtained as a result of an unlawful arrest (J.A. at 67).

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[8] The Supreme Court of Pennsylvania referred the matter to the trial court for the appointment of counsel.

Mr. Gallagher requested that the Supreme Court of Pennsylvania grant a new trial or, in the alternative, remand the matter for further hearings (J.A. at 68).

Without elaboration, on November 4, 1985, the Supreme Court of Pennsylvania denied the counseled Petition for Allowance of Appeal filed by Mr. Gallagher (J.A. at 69).[9]

SUMMARY OF ARGUMENT

The Commonwealth contends that the Third Circuit established a "mere presentation" rule which permits exhaustion of habeas claims upon a showing that the claims were placed before the state court, even if in a non-justiciable posture, and that Mr. Peoples' claims were not exhausted because one or more of the claims were defaulted or otherwise non-justiciable when presented to the Supreme Court of Pennsylvania.

An earlier decision of the Third Circuit, *Chaussard* v. *Fulcomer*, 816 F.2d 925 (3d Cir.), *cert. denied*, 108 S.Ct. 139 (1987), as broadly interpreted by the Commonwealth, may be read to establish a rule permitting mere presentation to the state court of last resort. To the extent that the Third Circuit's opinion may be so read, that court has acted inconsistently with prior decisions of this Court. Those decisions make clear that a "fair opportunity" to review the merits of habeas claims requires presentation in a posture which would permit the state court to reach the merits of the claims, if it determined to do so in the exercise of its discretion.

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[9] The Order of the Supreme Court of Pennsylvania states as follows: "November 4, 1985. Petition Denied." (J.A. at 69).

Here, one or more of Mr. People's claims were not raised at one or more levels of the proceedings in the lower courts of Pennsylvania, and it is on that basis that the Commonwealth contends that the claims were in a non-justiciable posture. However, all of the habeas claims were raised in the Supreme Court of Pennsylvania in either a counseled or *pro se* Petition for Allowance of Appeal, and any failure to raise a claim at an earlier stage of the proceedings was alleged to constitute the ineffective assistance of trial or earlier appellate counsel. Under a well-established and routinely-applied exception to Pennsylvania's default rule, Pennsylvania appellate courts may and regularly do consider the merits of otherwise defaulted claims, where the failure to raise claims at all earlier stages of the proceedings is alleged to be due to the ineffective assistance of counsel. Under this rule, all of Mr. Peoples' claims which were defaulted during any earlier stage of the proceedings before the courts of the Commonwealth of Pennsylvania were nonetheless in a justiciable posture before the Supreme Court of Pennsylvania.

Since all of Mr. Peoples' habeas claims were either raised at all earlier stages, or if not, it was alleged that the failure to so raise them was due to the ineffectiveness of prior counsel, the Supreme Court of Pennsylvania had a fair opportunity to review the merits of the claims. Accordingly, the habeas claims are exhausted.

ARGUMENT

The Supreme Court Of Pennsylvania Had A Fair Opportunity To Review The Federal Habeas Claims

Of the questions most often presented in the federal court's adjudication of habeas corpus petitions filed by state prisoners, *see Wainwright* v. *Sykes*, 433 U.S. 72,

78-79 (1977),[10] this case presents the question of to what extent a state prisoner must exhaust his state remedies and, more specifically, by what means are federal courts to evaluate whether a prisoner's alleged failure to comply with state appellate procedure deprived the state court of last resort of a "fair opportunity" to review the claims. The Commonwealth contends first, that the Third Circuit has established an incorrect rule by which mere token presentation of the habeas claims to the state court, even if in a non-justiciable posture, constitutes a fair opportunity for state court review; and second, that Mr. Peoples' claims were in a non-justiciable posture in the Supreme Court of Pennsylvania. Thus, the Commonwealth argues, analyzed in terms of the appropriate standard, one or more of Mr. Peoples' claims are unexhausted and his habeas petition should be dismissed.[11]

Mr. Peoples' position may be stated simply. As broadly read by the Commonwealth, the Third Circuit's holding in an earlier decision (*Chaussard* v. *Fulcomer*, 816 F.2d 925 (3d Cir.), *cert. denied*, 108 S.Ct. 139 (1987)), which was relied upon by the Third Circuit panel in this case, may well be inconsistent with the precedent of this Court. Mr. Peoples does not rely upon any "mere presentation" rule and thus does not defend the Commonwealth's broad interpretation of *Chaussard*. Rather, as a matter of Pennsylvania procedure, Mr. Peoples' claims were in a posture

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[10] *Wainwright* v. *Sykes* posited that four questions are most often raised in federal habeas litigation: 1) what types of claims may be considered? 2) to what extent must the federal court defer to state court resolutions? 3) to what extent must state remedies be exhausted? 4) in what instances will an independent state ground bar consideration of otherwise cognizable claims? 433 U.S. at 78-79.

[11] *See Rose* v. *Lundy*, 455 U.S. 509 (1982) (all claims in a petition must be exhausted).

in which they could have been reviewed in a routine fashion and in the ordinary course of proceedings by the Supreme Court of Pennsylvania. Thus, the claims were properly presented to that court and are exhausted in accordance with the well-established precedent of this Court.

I. Discussion Of Exhaustion Requirement

A. General Principles

This Court has examined the exhaustion requirement several times during the last century, beginning with *Ex parte Royall*, 117 U.S. 241 (1886), and although "this line of authority has not been without uncertainties and changes in direction on the part of the Court," *Wainwright* v. *Sykes*, 433 U.S. at 81, the comity-based underpinnings of the exhaustion requirement have been consistently recognized. *See, e.g., Ex parte Royall*, 117 U.S. 241, 251 (the exhaustion rule is based upon a "recognition of the fact that the public good requires [that relations between federal and state courts] be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution"); *Picard* v. *Connor*, 404 U.S. 270, 275-76 (1971) (quoting *Ex parte Royall); Rose* v. *Lundy*, 455 U.S. 509 (1982) (quoting *Ex parte Royall;* the Court examines policy underpinnings for rule).

This Court has had occasion to examine specifically the required mode of presentation to the state court of last resort on at least three occasions. In *Ex parte Hawk*, 321 U.S. 114, 116 (1944), the Court held that presentation of claims in the form of an application for an extraordinary writ did not constitute a fair opportunity to address the claims. The holding in *Ex parte Hawk* was reaffirmed in *Pitchess* v. *Davis*, 421 U.S. 482 (1975), another extraordi-

nary writ case. There, the Court focused upon the extremely restricted extent of the state supreme court's jurisdiction in the issuance of the writ, which jurisdiction was limited to "questions of first impression and general importance." *Id.* at 488 (quoting *People* v. *Medina*, 6 Cal.3d 484, 491, 492 P.2d 686, 690 (1972) (en banc)). Because of this severely limited jurisdiction, the state court of last resort would be barred from reviewing the claims unless it also found that the issues were novel and of public importance. Thus, the claims were not exhausted.

Finally, this Court's most recent comprehensive discussion on the question of the required mode of presentation to the state court was *Picard* v. *Connor*, 404 U.S. 270 (1971). There, the Court held that the comity-based underpinnings of the exhaustion rule required not only that the factual predicate for the habeas claims be presented to the state court, but also that the state court be presented with the federal constitutional theory upon which the claim was grounded. *Id.* at 276-78. The Court reasoned that "[i]f the exhaustion doctrine is to prevent 'unnecessary conflict between the courts equally bound to guard and protect rights served by the Constitution,'" there must be a fair presentation of the claim in the state court. *Id.* at 275-76 (quoting *Ex parte Royall*, 117 U.S. at 251).

Read together, these cases establish the principle that a habeas claim has been exhausted if the claim has been presented to the state court in terms of the same legal and factual grounds as in the habeas petition, and in a posture in which the state court may reasonably address the merits of the claim.

B. Identification Of Federal Constitutional Theories To State Court

A related matter concerns the specificity with which a prisoner must identify the federal constitutional underpinnings of the claims in the state courts. This Court considered this aspect of the exhaustion rule in *Picard* v. *Connor*, 404 U.S. 270, a case in which the prisoner claimed in the state courts that the indictment against him was invalid, but contended in the habeas court that he had been denied equal protection under the Fourteenth Amendment. This Court held that the two claims were so different that the state courts had not been given a fair opportunity to address the latter claim. *Id.* at 274-77. However, the Court recognized that "there are instances in which 'the ultimate question for disposition' will be the same despite variations in the legal theory or factual allegations urged in its support." *Id.* at 277 (quoting *United States ex rel. Kemp* v. *Pate*, 359 F.2d 749, 751 (7th Cir. 1966)). Although the Court found that a different legal theory had been advanced in the state courts, it was careful to point out that strict standards of pleading will not be enforced:

> [W]e do not imply that respondent could have raised the equal protection claim only by citing "*book and verse on the federal constitution.*" We simply hold that *the substance* of a federal habeas corpus claim must first be presented to the state courts. The claim that an indictment is invalid is not the *substantial equivalent* of a claim that it results in an unconstitutional discrimination.

Id. at 278 (citations omitted) (emphasis added).

Following *Picard*, the Courts of Appeals have fleshed out *Picard's* functional or "substantial equivalency" and have reached a consensus as to the means by which the

question may be addressed. For example, the Third Circuit has stated that the "method of analysis" asserted in the habeas court must be such that the state court had notice of the nature of the federal right that the petitioner contends was violated. *Bisaccia* v. *Attorney General of New Jersey*, 623 F.2d 307, 310 (3d Cir. 1980).[12] The habeas court may, of course, find exhaustion when briefs and opinions in the state court record include citations to specific constitutional provisions. *Daye* v. *Attorney General of New York*, 696 F.2d 186, 192 (2d Cir. 1982) (en banc). However, there are a number of other ways that a prisoner may alert the state court to the nature of his federal constitutional claim. *Id.* at 192-94.

Reliance in the state court upon specific federal constitutional decisions provides notice of the underlying nature of the claim. *See Brown* v. *Cuyler*, 669 F.2d 155, 159 (3d Cir. 1982). Similarly, a prisoner's claim that he was deprived of a federally guaranteed right, without a specific constitutional or decisional citation, may be sufficient. *See Twitty* v. *Smith*, 614 F.2d 325, 332 (2d Cir. 1979). Of course, the more specific the description of the alleged violation, the more easily the state court will be alerted to the nature of the claim. *Daye* v. *Attorney General of New York*, 696 F.2d at 193.

Under the appropriate circumstances, a claim that a petitioner has been denied a "fair trial" will be sufficient to alert the state court to a claim of a denial of the petitioner's federal due process rights. *Bisaccia* v. *Attorney General*

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[12] In order to determine whether the state courts were presented with the "substantial equivalent" of the claims made in the federal habeas petition, the habeas court should examine the pretrial, trial and appellate briefs submitted to the state court. *Picard* v. *Connor*, 404 U.S. at 273-74.

of New Jersey, 623 F.2d at 310. The concept of "fairness" comprises a broad spectrum of procedural rights and protections, some of which are of statutory or decisional origin, while others are based on a variety of constitutional provisions, including the due process clause. In order to determine whether the claimed deprivation of a "fair trial" was sufficient to alert the state court to a claimed violation of the due process clause, the federal habeas court must look to the nature of the facts and the analysis underlying the claim.

In *Bisaccia* v. *Attorney General of New Jersey*, the Third Circuit held that the appropriate inquiry is whether "the 'method of analysis' asserted in the federal courts was readily available to the state court." 623 F.2d at 310 (quoting *Zicarelli* v. *Gray*, 543 F.2d 466, 472 (3d Cir. 1976)). This approach focuses on the facts of the case and on whether a method of analysis consistent with the federal constitutional considerations was apparent in state court. *Bisaccia* v. *Attorney General of New Jersey*, 623 F.2d at 311. In *Bisaccia*, the petitioner contended in his federal habeas petition that he had been denied his federal due process rights based on the admission of evidence of a guilty plea by a testifying conspirator. The New Jersey Supreme Court had examined the issue by "pursu[ing] a method of analysis consistent with Fourteenth Amendment due process determinations." *Id.* at 311. The claim was thus exhausted.

A similar approach was established by the Second Circuit in *Daye* v. *Attorney General of New York*, a case in which the petitioner contended in his federal habeas petition that he was denied his federal due process rights because of the bias of the trial judge. 969 F.2d at 188-189. Although he had claimed a deprivation of a "fair trial" on the same facts in the state courts, the Second Circuit

found the "factual matrix" underlying the claim to be "well within the mainstream of due process adjudication." *Id.* at 193 (quoting *Johnson* v. *Metz*, 609 F.2d 1052, 1057 (2d Cir. 1979) (Newman, J., concurring)).

The "substantial equivalency" standard established by this Court in *Picard* has resulted in a practical standard by which the lower courts may consider the issue in a consistent and fair manner.

C. The Third Circuit's Decisions In *Chaussard* v. *Fulcomer* And In This Case

In *Chaussard* v. *Fulcomer*, 816 F.2d 925 (3d Cir.), *cert. denied*, 108 S.Ct. 189 (1987),[13] the prosecution contended that of four closely related habeas claims, two had not been raised in the Pennsylvania Superior Court, although all four were apparently raised in the Supreme Court of Pennsylvania. Whether, in fact, the two claims had been defaulted in the Pennsylvania Superior Court is not addressed in *Chaussard*. The default is only referred to in the court's description of the prosecution's contentions. The prosecution argued that the Supreme Court of Pennsylvania did not have a "realistic opportunity" to address the two defaulted claims because claims not raised at all earlier stages of the proceedings are deemed waived and are non-justiciable before the Supreme Court of Pennsylvania. *Id.* at 928. Although the Third Circuit discussed several related exhaustion issues, it did not discuss the contention that the default in the Superior Court precluded review by the Supreme Court of Pennsylvania and

[13] The Third Circuit in *Chaussard* held the habeas claims to be exhausted but ruled against the prisoner on the merits. The prisoner sought review before this Court on the merits of his claims but his Petition for a Writ of Certiorari was denied.

simply stated that the prisoner had "satisfied the exhaustion requirement." *Id.* at 928.[14]

The Commonwealth argues that *Chaussard* stands for the proposition that defaulted claims merely presented to the state court of last resort are nonetheless exhausted. The Commonwealth posits this broad interpretation of *Chaussard*, which it labels a "mere presentation" rule, as the principal issue before this Court and asks this Court to hold that this interpretation is not consistent with precedent and policy. If this "mere presentation" rule is not valid, the Commonwealth argues, it should prevail in this case.

The Commonwealth's broad interpretation of *Chaussard* will not be defended by Mr. Peoples, although reasonable minds may differ as to whether the Third Circuit held that defaulted claims are nonetheless exhausted. As is demonstrated below, Mr. Peoples should prevail because, although the state record is not tidy, all habeas claims were fairly presented to the Supreme Court of Pennsylvania.

The Third Circuit's record on the issue is made clear by its post-*Chaussard* decision in *O'Halloran* v. *Ryan*, 835 F.2d 506 (3d Cir. 1987). In *O'Halloran*, a claim arguably defaulted in the trial court was raised in the Superior Court of Pennsylvania in terms of ineffective assistance of counsel and the Supreme Court of Pennsylvania denied discretionary review. On habeas review, the Third Circuit found the claims to be unexhausted. If the *O'Halloran* panel had shared the Commonwealth's broad reading of

[14] Based upon a review of the record in *Chaussard*, undersigned counsel informed the Third Circuit at oral argument that at least one of the claims appeared to have been defaulted.

Chaussard, the claims would have been held to be exhausted because they were, even if earlier defaulted, "presented" to the Supreme Court of Pennsylvania in a petition for discretionary review.

The prisoner in *O'Halloran* argued, as does Mr. Peoples, that his claims were justiciable on direct appeal to the Supreme Court of Pennsylvania because the defaults were the result of the ineffectiveness of prior counsel. However, relying upon the same outdated and overruled Superior Court precedent as that cited by the Commonwealth in this appeal, *Commonwealth* v. *Cook*, 230 Pa. Super. 283, 320 A.2d 461 (1974), the Third Circuit held that the lack of a record in the state appellate courts precluded review on that appeal. Thus the *O'Halloran* court ruled the prisoner would be required to seek collateral review under the Pennsylvania Post Conviction Hearing Act. 835 F.2d at 509-510.

While *O'Halloran* demonstrates that the Third Circuit did not adopt a "mere presentation" rule in *Chaussard*, it also reflects the same incorrect and outdated view of Pennsylvania law as that advanced by the Commonwealth in this case.

II. Applicable Procedural Rules Of The Commonwealth Of Pennsylvania

A. Ineffectiveness Of Control Exception To The Pennsylvania Default Rule

It is important to recognize the difference between the manner in which the federal courts and the courts of Pennsylvania may review newly raised claims on direct appeal. In general, in both the federal and the Pennsylvania court systems, an appellate court will not review a claim raised for the first time on appeal or defaulted at an earlier stage of the proceedings. *See, e.g., United States*

v. *Schreiber*, 599 F.2d 534, 538 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979). Pennsylvania vigorously applies a waiver rule to the preservation of claims for appellate review. *See, e.g., Commonwealth* v. *Holmes*, 315 Pa. Super. 256, 461 A.2d 1268 (1983)(post trial motion alleging insufficient evidence preserves no claim; even a claim of insufficiency of evidence is waived); *Commonwealth* v. *Gravely*, 486 Pa. 194, 404 A.2d 1296 (1979) (claims must be in the post trial motion itself; claims made in the brief supporting the motion are deemed waived).

Consistent with the strict enforcement of this waiver policy is Pennsylvania's rule that claims that prior counsel was ineffective are deemed waived if they are not raised at the earliest stage of the proceedings at which the allegedly ineffective attorney no longer represents the defendant. Thus, Pennsylvania courts will invoke this rule to deny review, even on collateral attack, of ineffectiveness claims not raised at the earliest stage at which the allegedly ineffective lawyer no longer represented the defendant. *See Commonwealth* v. *Strachan*, 460 Pa. 407, 333 A.2d 790 (1975); *Commonwealth* v. *Dancer*, 460 Pa. 95, 331 A.2d 435 (1975); *Commonwealth* v. *Smallwood*, 465 Pa. 392, 350 A.2d 822 (1976); *Commonwealth* v. *Seachrist*, 478 Pa. 621, 387 A.2d 661 (1978); *Commonwealth* v. *Wallace*, 495 Pa. 295, 433 A.2d 856 (1981).

This line of decisions finding waiver of ineffectiveness claims when they are raised by new counsel on direct appeal is onerous and, at times, harsh. However, there is, as a consequence of this waiver rule, a means by which a claim may be raised, even if earlier defaulted, where the failure to raise and/or preserve the claim is alleged to be due to the ineffectiveness of prior counsel. If the Pennsylvania courts will deem a defendant to have waived ineffectiveness claims when the claims are not raised buy new

counsel, it follows that ineffectiveness claims, if they are raised on direct appeal, are justiciable. That is, since the claims must either be raised or be deemed waived, the appellate courts of the Commonwealth of Pennsylvania have jurisdiction to review the newly raised claims on direct appeal. *See Commonwealth* v. *Carter*, 463 Pa. 310, 344 A.2d 846 (1975); *Commonwealth* v. *Hubbard*, 472 Pa. 259, 276-77 n.6, 372 A.2d 687, 695 n.6 (1977).

There are at least four rationales in Pennsylvania case law for the review of ineffectiveness claims raised on direct appeal for the first time.

First, in *Commonwealth* v. *Dessus*, 423 Pa. 177, 224 A.2d 188 (1966), the Supreme Court of Pennsylvania reiterated its general rule that claims will not be considered for the first time an appeal, but recognized a general exception "where public policy or the interests of justice require a consideration and determination" of the issue. 423 Pa. at 178, 224 A.2d at 193. In *Commonwealth* v. *Faison*, 437 Pa. 432, 264 A.2d 394 (1970), in express reliance upon the public policy exception to the waiver rule articulated in *Dessus*, the Supreme Court of Pennsylvania expressly held, apparently for the first time, that defaulted ineffectiveness claims could be raised on appeal for the first time:

> To require appellant to raise this issue below, i.e. to require appellant's trial counsel to challenge his own competence at trial or in post-trial motions, would clearly be pointless. Where an appellant is represented in the appeal *nunc pro tunc* by counsel other than the trial counsel and an issue of competent counsel arguably appears in the record, the considerations set forth in *Commonwealth* v. *Dessus*, *supra*, dictate that such an issue should be considered.

437 Pa. at 443, 264 A.2d at 400.

Second, in *Commonwealth* v. *Faison*, and in *Commonwealth* v. *Carter*, the Supreme Court of Pennsylvania reasoned that it would be unrealistic, pointless, as well as demeaning to counsel, to expect counsel to raise his or her own ineffectiveness as a claim. 463 Pa. at 314, 344 A.2d at 848. *See also Commonwealth* v. *Smith*, 494 Pa. 294, 433 A.2d 1349 (1981).[15]

Third, if a failure to raise the claim as soon as the allegedly ineffective counsel no longer represents the defendant will be deemed a waiver, it logically follows that the claim, if raised, is justiciable. *Commonwealth* v. *Hubbard*, 472 Pa. at 276-77 n.6, 372 A.2d at 695 n.6.

Fourth, judicial economy is advanced if the appellate court, often while considering otherwise non-defaulted claims, can simultaneously address ineffectiveness claims. This rationale is illustrated most pointedly in the Pennsylvania cases which permit an attorney to raise his or her own ineffectiveness for the first time on appeal if the error is apparent on the record. *See Commonwealth* v. *Fox*, 476 Pa. 475, 383 A.2d 199 (1978); *Commonwealth* v. *Serianni*, 337 Pa. Super. 309, 313, 486 A.2d 1349, 1351 (1984). Despite judicial statements that it would be unseemly and demeaning to require counsel to argue his or her own ineffectiveness, "judicial economy is promoted since the appeal may be disposed of without the further procedural steps required for appointment of new counsel." *Commonwealth* v. *Glaze*, 366 Pa. Super. 517, 521, 531 A.2d 796, 798 (1987).

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[15] Nonetheless, the Pennsylvania courts will even permit a lawyer to raise his or her own ineffectiveness as a new claim on direct appeal if the error is apparent on the record. *Commonwealth* v. *Fox*, 476 Pa. 475, 383 A.2d 199 (1978).

Where ineffectiveness claims are raised in the Pennsylvania appellate courts for the first time on direct appeal, the Supreme Court of Pennsylvania has recognized that the appellate court has three choices for the resolution of the claims:

> The problem in this case, as in most cases where the claim of ineffective assistance of counsel is raised on direct appeal, is that we have before us no record of any hearing at which is delineated trial counsel's reasons for taking the steps later challenged. Where the record on appeal clearly shows that there could have been no reasonable basis for a damaging decision or omission by trial counsel, then of course, the judgment must be vacated and appropriate relief, such as allowing the filing of post trial motions or the ordering of a new trial, granted. Where, on the other hand, it is impossible to tell from the record whether or not the action of trial counsel could have had a rational basis, the appellate court will vacate the judgment, at least for the time being, and remand for an evidentiary hearing at which trial counsel may state his reasons for having chosen the course of action taken. Neither of these remedies, however is appropriate if on the record it is apparent that the actions claimed to constitute ineffectiveness were in fact within the realm of trial tactics or strategy. A finding of ineffectiveness of counsel cannot be made "unless we con[clude] that the alternatives not chosen offered a potential for success substantially greater than the tactics actually utilized."

Commonwealth v. *Turner*, 469 Pa. 319, 324, 365 A.2d 847, 849 (1977) (ineffectiveness claims raised an direct appeal; court addresses merits and affirms convictions)(footnotes and citations omitted).

Where the claim is made that trial or earlier appellate counsel has been ineffective and the Supreme Court or Superior Court of Pennsylvania can evaluate the claim on

the basis of the existing record, the courts can address the merits of the claim and affirm the conviction. *See Commonwealth* v. *Carter*, 463 Pa. 310, 344 A.2d 846; *Commonwealth* v. *Turner*, 469 Pa. 319, 365 A.2d 847; *Commonwealth* v. *Johnson*, 479 Pa. 60, 387 A.2d 834 (1978)(court affirms conviction, reaching the merits of an ineffectiveness claim); *Commonwealth* v. *Tessel*, 347 Pa. Super. 37, 53, 500 A.2d 144, 152 (1985) (new counsel raises ineffectiveness claim for the first time on appeal; affirming on the merits, the court states, "[t]he claim is . . . properly before us").

Where the merits of the ineffectiveness claim, raised for the first time on appeal, are not apparent from the record, the Pennsylvania appellate courts can remand the case to the trial court for the purpose of a hearing on the merits. *See Commonwealth* v. *Murphy*, 316 Pa. Super. 178, 182, 462 A.2d 853, 855 (1983)(remand to Court of Common Pleas for hearing and a decision); *Commonwealth* v. *Jellots*, 277 Pa. Super. 358, 363, 419 A.2d 1184, 1187 (1980)(same). There is no requirement that a collateral attack be mounted under the Post Conviction Hearing Act.

The case of *Commonwealth* v. *Hubbard*, 472 Pa. 259, 372 A.2d 687 (1977), *appeal after remand*, 485 Pa. 353, 402 A.2d 999 (1979), is instructive and demonstrates the manner in which the Supreme Court of Pennsylvania routinely reviews claims such as those asserted by Mr. Peoples. Hubbard was convicted of murder in the Court of Common Pleas and on direct appeal contended that post-trial counsel[16] was ineffective because in the post verdict

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[16] Hubbard was represented at trial and for the purpose of post verdict motions by retained counsel (trial counsel), a public defender who filed supplemental post verdict motions (post-trial counsel), and on direct appeal by another public defender (appellate counsel).

motions he failed to raise a claim of ineffective assistance of trial counsel based on the latter's failure to object to certain prejudicial statements made in the prosecutor's closing. After finding the contention to be of "arguable merit," the Supreme Court vacated the judgment of sentence and remanded the case for an evidentiary hearing. 485 Pa. at 356, 402 A.2d 1000. Upon completion of the hearing and entry of an adjudication by the trial court, the matter was placed directly before the Pennsylvania Supreme Court, which affirmed the conviction. 485 Pa. at 358, 402 A.2d at 1000-01.

Finally, when the merits of a claim of ineffective assistance of counsel are susceptible to review on direct appeal, the Supreme Court can address the merits and reverse the judgment of sentence. *See Commonwealth* v. *Morin*, 477 Pa. 80, 383 A.2d 832 (1978). In *Morin*, the defendant's first counsel failed to raise the issue of the defendant's waiver of a jury trial in post verdict motions and before the Superior Court. New counsel raised the issue in terms of ineffective assistance of counsel before the Supreme Court of Pennsylvania, claiming the failure to raise the claim was due to earlier counsel's ineffectiveness. Rejecting the prosecution's argument that the case should be remanded for a hearing on the matter, the Supreme Court of Pennsylvania addressed the merits of the claim, reversed the judgment of sentence and remanded the case for a new trial. 477 Pa. at 88, 383 A.2d at 835.

Similarly, in *Commonwealth* v. *Fassett*, 496 Pa. 529, 437 A.2d 1166 (1981), the defendant was represented by new counsel in the Supreme Court of Pennsylvania and raised for the first time the contention that trial counsel was ineffective for failing to move for the suppression of the fruits of a vehicle stop. The failure of prior counsel to raise and preserve the issue was alleged to be due to

earlier counsel's ineffectiveness. With a citation to *Commonwealth* v. *Hubbard*, the Supreme Court stated that the matter was properly before it and, finding earlier counsel ineffective, reversed and remanded for a new trial. 496 Pa. at 532 n.2, 534, 437 A.2d at 1168 n.2, 1169.

This Court need go no further than the record in this case to understand the application of the ineffectiveness exception to the waiver rule. Mr. Peoples was represented by new counsel in the Superior Court and new counsel argued, for the first time, that trial counsel was ineffective in several specifics (J.A. at 27, 39-43). In its Memorandum Opinion, the Superior Court noted that since new counsel had been appointed, the claims were "reviewable even though they had not been previously raised." (J.A. at 47). Accordingly, the court addressed the merits of the claims (*Id.*).

B. The Commonwealth's Arguments

The Commonwealth makes several arguments concerning Pennsylvania law which are incorrect. First, citing a 1974 Superior Court case, *Commonwealth* v. *Cook*, 230 Pa. Super. 283, 320 A.2d 461 (1974), and ignoring the above-cited cases from the Supreme Court Pennsylvania, the Commonwealth argues that a claim of ineffectiveness of prior counsel "will not be decided on direct appeal unless clear and irrefutable proof of the issue appears on the face of the record." Petitioner's Brief at 11. Although *Cook* does so state, it has been plainly overruled by subsequent decisions of the Supreme Court of Pennsylvania. Citing *Commonwealth* v. *Davis*, 499 Pa. 282, 453 A.2d 309 (1982), the Commonwealth acknowledges that claims raised in terms of ineffectiveness that require some further record may be the subject of a remand, 499 Pa. 283-84, 453 A.2d at 310, but the Commonwealth argues

that the claims should be presented in a collateral attack on the conviction. However, as *Hubbard* made clear, the Pennsylvania appellate courts may remand for further hearings and the parties may then bring the matter back to the Supreme Court for review. There is no known statement in the decisions of the Pennsylvania appellate courts establishing a rule that a collateral attack is required or preferred in this context, or even establishing a standard by which the Pennsylvania courts will determine whether to review a previously defaulted claim on direct appeal. Thus, the Pennsylvania courts have reserved the sole and unrestricted discretion to review such claims on direct appeal, or to decline to do so, rather than requiring a collateral attack on the conviction.

The central question raised in this case is whether presentation of otherwise defaulted claims which are within Pennslyvania's ineffectiveness of counsel exception to its default rule constitutes a "fair opportunity" to review the claim, or is more akin to the extraordinary writs in *Ex parte Hawk* and *Pitchess* v. *Davis*. Based on the well established and documented procedures in the Pennsylvania courts, and the policies and principles underpinning the exhaustion rule, the claims so presented are plainly exhausted. At least four reasons support this conclusion.

First, Pennsylvania's review of claims under this rule is routine, well-established and in the ordinary course of the day-to-day administration of justice in the courts of the Commonwealth. Unlike the writs in *Ex parte Hawk* and *Pitchess* v. *Davis*, there is nothing extraordinary about such review.

Second, review on direct appeal under this rule does not require compliance with any additional burden or stan-

dard beyond that which would be applied on collateral review in the state courts. To the contrary, and unlike the situation *Ex parte Hawk* and *Pitchess* v. *Davis*, if the Supreme Court of Pennsylvania declines to review the claims on direct appeal, the prisoner would have the same burdens on collateral attack in terms of demonstrating a substantive error and the ineffectiveness of counsel in failing to preserve the claim. On both direct appeal and state collateral review, he would be required to demonstrate that any default was due to the ineffectiveness of counsel.

Third, Pennsylvania's rule is based, in part, on notions of judicial economy. To require a prisoner to mount a state collateral attack after review is denied by the Supreme Court of Pennsylvania would cause a needless waste of Pennsylvania's judicial resources. Since Pennsylvania law makes it clear the Pennsylvania courts do consider ineffectiveness claims on direct appeal, an exhaustion rule requiring a state collateral attack does violence to Pennsylvania's policy of judicial economy and renders wasted any resources already expended by the courts of the Commonwealth in their consideration of the claims on direct review.

Fourth, notions of comity are advanced by finding exhaustion in this case. Pennsylvania is otherwise a relatively waiver-oriented jurisdiction, but, after due deliberation and through a normal common law process of evaluation, has expressly announced a rule permitting review of otherwise defaulted claims. To hold such claims are not exhausted is to demean the prerogative of the Supreme Court of Pennsylvania to develop its own legal principles by rendering Pennsylvania's rule a nullity.

There is an irony to the Commonwealth's characterization of the mischief that would allegedly result if this

Court finds exhaustion for claims defaulted but plainly within Pennsylvania's ineffectiveness of counsel exception to its waiver rule. However, a holding that such claims are unexhausted would do far more to demean the Pennsylvania judiciary and to wreak havoc with its carefully balanced and well-considered system for adjudicating ineffectiveness claims. These ineffectiveness claims are held justiciable on direct appeal in order to advance judicial economy and as a consequence of Pennsylvania's rule that they are waived if not raised on direct appeal. To hold now that such claims must be presented through a collateral attack, as the Commonwealth urges, is to cause the same waste of judicial resources which caused the Pennsylvania courts to recognize the exception to the waiver rule in the first instance. More seriously, if this Court were to require collateral review, Pennsylvania's rule finding waiver when ineffectiveness claims are not raised on direct appeal will no longer be valid or enforceable since the waiver rule established that ineffectiveness claims raised by new counsel are justiciable. The damage to federal/state comity from such interference in the administration of justice in the Commonwealth of Pennsylvania would be immense.

Most importantly, the ultimate basis for the comity-based exhaustion rule—that state and federal courts are equally bound to enforce the federal constitution—is advanced by holding these claims to be exhausted, because the Supreme Court of Pennsylvania had an opportunity to review the claims pursuant to and in accordance with its own pronouncements.

The Commonwealth contends that the *pro se* Petition for Allowance of Appeal may not be considered in determining whether the claims were exhausted. The *pro se* Petition was a timely-filed petition for substantive review

and the appointment of counsel. It complied with the applicable rules of procedure as to the contents of a petition for allowance of appeal and expressly requested substantive review and the appointment of counsel.

The Commonwealth contends that the *pro se* Petition may not be considered to be a request for substantive review but should only be considered a request for the appointment of counsel because that is required under some "standard practice" in Pennsylvania. This argument is meritless, because there is no statement in the statutes, rules or decisional authority to the effect that *pro se* petitions for allowance of appeal may not be considered as a request for substantive review. Petitioner's Brief at 17. Any claim of a "standard practice" is completely unsupported and is inconsistent with the rules and statutes of Pennsylvania. The *pro se* Petition plainly requested substantive review and, by way of separate relief, asked for appointment of counsel.

The *pro se* Petition for Allowance of Appeal cited the appropriate statute and rule of court in its opening paragraph (J.A. at 49).[17] The title of the document plainly requests two forms of relief, substantive review and appointment of counsel (*Id.*) and the relief requested consists of the following:

> WHEREFORE, for all of the foregoing reasons your Honorable Supreme Court should grant the *pro se* petition of Michael Peoples for allowance to appeal the constitutional and Statutory errors of the lower

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[17] The *pro se* Petition properly cited Rule 1113 of the Pennsylvania Rules of Appellate Procedure but cited "42 Pa. C.S.A. Section 524" as the basis for discretionary review. The reference to "Section 524" is plainly a typographical error since Section 724 of the Pennsylvania Judicial Code grants discretionary jurisdiction.

court and the Superior court *and* to order appointment of new counsel who can raise and argue ineffective assistance of former trial, post-verdict and appellate counsel.

(J.A. at 58-59)(emphasis added).

The Supreme Court of Pennsylvania did not rule on the merits of the *pro se* petition, but rather appointed counsel. The fact remains, however, that the court could have undertaken a review of the claims in the *pro se* Petition and thus had the requisite opportunity to address the claims.

III. Application Of Exhaustion Principles To Respondent's Claims

A. Admission Of Prior Convictions

The argument that he was improperly cross-examined on his prior convictions was raised in Mr. Peoples' post-trial motions (J.A. at 12), and was raised in his Superior Court brief (J.A. at 28, 34-37). It was raised in the counseled Petition for Allowance of Appeal (J.A. at 66-67), and it was raised as well in the *pro se* Petition for Allowance of Appeal (J.A. at 53). In the *pro se* Petition, Mr. Peoples argued that he was denied a "fair trial" and cited the decisions of the Supreme Court of Pennsylvania in *Commonwealth* v. *Schmidt*, 317 Pa.Super. 241, 463 A.2d 1175 (1983) and *Commonwealth* v. *Bighum*, 452 Pa. 554, 307 A.2d 255 (1973).

The federal habeas petition alleges a "due process 14th amendment" violation based upon the use of two prior robbery convictions and a conviction for retail theft to impeach Mr. Peoples' credibility (J.A. at 73).[18] The Com-

[18] The claim is also characterized as being based on violation of a state statute which prohibits use of prior convictions (J.A. at 73). *See* 42 Pa. C.S. § 5918.

monwealth argues that the legal basis of this claim was not presented to the state courts[19] since it was raised in terms of the ineffective assistance of counsel under the Sixth Amendment in both the *pro se* Petition for Allowance of Appeal and the counseled Petition for Allowance of Appeal (Petitioner's Brief, p. 12). In addition, the Commonwealth contends that the claim was unreviewable by the state court due to the lack of a record (Petitioner's Brief, p. 13).

The claim based on the impeachment use of Mr. Peoples' prior convictions was raised in the *pro se* Petition in terms of ineffective assistance of counsel, prosecutorial misconduct, and in terms of substantive error by the trial court and the Superior Court,[20] causing the deprivation of Mr. Peoples' right to "receive a fair trial" (J.A. at 53). It was also raised in the counseled Petition for Allowance of Appeal (J.A. at 66-67). Although Mr. Peoples also relied on the state statute regulating use of prior convictions, it is manifestly clear that the federal due process clause was the basis for review for at least four reasons. First, in his *pro se* Petition, Mr. Peoples referred to the deprivation of a "fair trial" caused by the use of the convictions. Under

[19] The Commonwealth also contends that the evidence was not objected to at trial. If this is to suggest that the claim was not preserved at trial because an objection was not made while Mr. Peoples was being cross-examined, it is meritless. The question of the impeachment use of convictions is the subject of a separate hearing in Pennsylvania, known as a *Bighum* hearing, convened before the defendant testifies. Such a hearing was held in this case (n.t. Trial 259, 269). Moreover, there is no requirement of a separate objection at the time of the testimony in order to preserve the claim.

[20] The *Pro Se* Petition alleged that the "trial court and Superior Court committed error by upholding the unlawful ruling by violating, *Commonwealth* v. *Bighum*, 452 Pa. 554" (J.A. at 53).

the "substantial equivalency" approach adopted in *Picard*, the Supreme Court of Pennsylvania was plainly aware that the petitioner asserted that the overall impact of the admission of such evidence was to taint the truth-finding function of the trial, a claim sounding in due process.

Second, Mr. Peoples cited the decision of the Supreme Court of Pennsylvania in *Commonwealth* v. *Bighum*, 452 Pa. 554, 307 A.2d 255 (1973), a case in which the Court established guidelines for the use of prior convictions to impeach a testifying criminal defendant (J.A. at 53). The procedure for determining whether a testifying defendant may be impeached is known in Pennsylvania as a *Bighum* hearing, and such a hearing was held in this case (n.t. Trial at 269). A citation or reference to *Bighum* alone alerted the Supreme Court of Pennsylvania to a claim of a due process violation. In *Bighum*, a criminal defendant alleged a due process violation based upon the trial court's determination that prior convictions were admissible. 452 Pa. at 562, 307 A.2d at 260. The Supreme Court of Pennsylvania rejected the claim, relying upon the due process analysis of this Court in *Spencer* v. *Texas*, 385 U.S. 554, *reh'g denied*, 386 U.S. 969 (1967)(due process challenge to Texas redicivist statute permitting admission of prior convictions during guilt phase). A citation or reference to *Bighum* is thus tantamount to and is understood to be an express invocation of the due process clause.

Third, the history of litigation before the Supreme Court of Pennsylvania concerning the issue of the admissibility of prior convictions of testifying criminal defendants alone would alert the Supreme Court to the basis for the claim. Although decisions have also discussed the state statute regulating such use, consideration of the due process implications and the impact on the

overall fairness of the trial is a consistent theme. *See Commonwealth* v. *Moore*, 246 Pa. Super. 163, 369 A.2d 862 (1977) (*Bighum* cited and construed to be based on due process analysis); *Commonwealth* v. *Butler*, 405 Pa. 36, 173 A.2d 468 (1961) (due process); *Commonwealth* v. *Miller*, 465 Pa. 458, 350 A.2d 855 (1976) (citation to *Bighum); Commonwealth* v. *Peterman*, 430 Pa. 627, 244 A.2d 723 (1968) (due process clause not expressly cited, but impact on overall fairness of the trial considered).

Fourth, in the counseled Petition for Allowance of Appeal, counsel cited not only the state statute on impeachment and cited *Commonwealth* v. *Schmidt*, 317 Pa. Super. 241, 463 A.2d 1175 (1983) (construing the statute on impeachment use of convictions), but also cited *Commonwealth* v. *Moore*, discussed *supra*, a case specifically addressing due process considerations and citing *Bighum* (J.A. at 64-68).

The Commonwealth's contention that the claim is phrased in the state courts only in terms of ineffective assistance of counsel and prosecutorial misconduct is similarly unavailing. The reference to "prosecutorial misconduct" in the *pro se* Petition is not an unexpected characterization of the issue by a lay petitioner since it was the prosecutor who impeached Mr. Peoples and argued the convictions to the jury. However, Mr. Peoples did not limit his characterizations to those phrases. He further argued as follows in his *pro se* Petition:

> The *trial court and Superior Court committed error by* upholding the unlawful ruling by violating, *Commonwealth* v. *Bighum* . . . and[21] allowing the Com-

[21] The quoted sentence also included a reference to a deprivation of Mr. Peoples' "Sixth Amendment right" to present his "only meaningful defense." (J.A. at 53).

> monwealth to use evidence of unrelated prior robbery and theft criminal convictions before the jury to discredit defendant's trial testimony.

(J.A. at 53)(emphasis added)

Finally, the Commonwealth argues that the lack of a record precluded the Supreme Court from actually considering the issue (Petitioner's Brief, p. 13). Although the Commonwealth concedes that Mr. Peoples was obligated to raise the claim at that stage, it argues that a petition under the Pennsylvania Post Conviction Relief Act was required.[22] This argument is meritless since a record was made as to the claim based on the improper admission of the prior convictions. The claim was made in the Post Verdict Motions (J.A. at 12) and was addressed in the trial court's post-trial opinion (discussion of "*Bighum* hearing" convened before the defense opened its case) (J.A. at 21-22). It was addressed on appeal in the Superior Court's brief (relying on *Bighum)* (J.A. 28, 34-37), in the Superior Court's Memorandum Opinion (J.A. at 46), in the *pro se* Petition for Allowance of Appeal (J.A. at 53), and in the counseled Petition for Allowance of Appeal (J.A. at 66-67).[23] Moreover, there is no requirement that a record be made before the Supreme Court of Pennsylvania may consider such a claim.

Accordingly, the claim of a due process violation based on the impeachment use of Mr. Peoples' prior convictions

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[22] 42 Pa. C.S. § 9541 *et seq.*

[23] In the counseled Petition for Allowance of Appeal, counsel may be read to posture this argument in terms of ineffective assistance of counsel and to request a remand to make a record (J.A. at 66-68). This assertion by counsel was erroneous and is apparently the basis for the district attorney's representation that no record exists to support the claim.

was fairly presented to the Supreme Court of Pennsylvania and is thus exhausted.

B. Deprivation Of A Non-Jury Trial

The claim that he was unconstitutionally deprived of a non-jury trial was not raised in the Superior Court Brief (J.A. at 26-43). Although the issue was not raised in the counseled Petition for Allowance of Appeal (J.A. at 64-68), the claim of a due process and equal protection violation on the basis of the denial was amply and precisely raised in the *pro se* Petition for Allowance of Appeal (J.A. at 53-54).

In his federal habeas petition Mr. Peoples contended that he was denied a non-jury trial, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment (J.A. at 74). In his *pro se* Petition for Allowance of Appeal, this claim was raised in terms of his "Federal and State constitutional rights to equal protection and Due Process of the laws under the Fourteenth Amendment of the United States constitution." (J.A. at 53).

The Commonwealth contends that the claim of an equal protection and due process violation was waived and was not reviewable by the Supreme Court since the claim was not made in Mr. Peoples' Post Verdict Motions or in the Superior Court Brief. Even if Mr. Peoples' Superior Court or trial counsel did not raise due process and equal protection arguments with sufficient specificity in the trial court and the Superior Court, the claims were expressly made in the *pro se* Petition for Allowance of Appeal in terms of the due process and equal protection clauses (J.A. at 53). It was specifically argued that the failure of previous counsel to properly raise these claims constituted the ineffective assistance of trial and appellate counsel (J.A.

at 50, 52, 53). Raised in this way, the claims were not defaulted and were reviewable by the Supreme Court of Pennsylvania on direct appeal.

C. Tainted Identification Procedures

The claim that improper identification procedures were used was raised in Post Trial Motions (J.A. at 12), was discussed in the Opinion denying his Post Trial Motions (J.A. at 20-21), was asserted in the Superior Court Brief (J.A. at 27, 29-34), and was discussed in the Superior Court's Memorandum Opinion (J.A. at 45). The issue was not raised in the counseled Petition for Allowance of Appeal (J.A. at 64-68), but was raised in explicit terms in the *pro se* Petition for Allowance of Appeal (J.A. at 54-55). Thus, the issue was properly placed before the Supreme Court of Pennsylvania.

D. Ineffective Assistance Of Counsel

Mr. Peoples raises two claims in his habeas corpus Petition as to the ineffectiveness of counsel (J.A. at 74-75):

a. Trial Counsel failed to seek suppression of the fruits of the arrest (J.A. at 74).

This claim was not raised in Post Trial Motions (J.A. 11-13) and was not raised in the Superior Court Brief by new counsel (J.A. at 41-43). It was raised in terms of the ineffective assistance of appellate counsel in the counselled Petition for Allowance of Appeal (J.A. at 67). The failure of Superior Court Counsel to raise the claim was alleged to constitute the ineffective assistance of counsel (J.A. at 67). Thus, the claim was reviewable on direct appeal by the Supreme Court of Pennsylvania.

b. Trial Counsel failed to object to evidence of a change in Mr. Peoples' hair, allegedly in violation of a court order (J.A. at 74-75).

This was not addressed in the Post Trial Motions, the Superior Court Brief or the counseled Petition for Allowance of Appeal. However, it was raised expressly and explicitly, in terms of the ineffective assistance of trial and appellate counsel, in the *pro se* Petition for Allowance of Appeal (J.A. at 55-57). The failure of trial and Superior Court counsel to properly preserve the claim was specifically alleged to constitute the ineffectiveness of counsel. (J.A. at 50, 55) Thus, the claim was reviewable on direct appeal by the Supreme Court of Pennsylvania.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the Third Circuit Court of Appeals be affirmed.

Respectfully submitted,

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